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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF A.R., N.R., A.M., T.M., and)
D.M., MINOR CHILDREN, AND THEIR)
MOTHER, MARY McWHIRTER, and)
FATHERS, RONALD RYKER AND CARL)
McWHIRTER,)
)
MARY McWHIRTER, RONALD RYKER)
AND CARL McWHIRTER,)
Appellants-Respondents,)
)
vs.)
)

No. 49A02-0604-JV-360

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)
Appellee,)
)
CHILD ADVOCATES, INC.,)
Appellee (Guardian ad Litem).)

APPEAL FROM THE MARION SUPERIOR COURT
PROBATE DIVISION
The Honorable Robyn Moberly, Judge
Cause No. 49D12-0312-JT-2315

February 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

In this consolidated appeal, Appellants, Mary McWhirter (“Mary”), Carl McWhirter (“Carl”), and Ronald Ryker (“Ronald”) (collectively “the Parents”), challenge the trial court’s termination of their parental rights over their children A.R., N.R., A.M., T.M., and D.M. Although each of the Parents presents their arguments in a slightly different manner, the essence of each is that the evidence was insufficient to support the trial court’s decision to terminate their parental rights.

We affirm.

The record reveals that Mary and Ronald were married from May of 1994 until November of 1998. While married to Ronald, Mary gave birth to A.R., born on February 6, 1995, and N.R., born on June 16, 1997. After divorcing Ronald, Mary married Carl and had three more children by him: A.M., born April 1, 1999, T.M., born September 19,

2000, and D.M., born December 2, 2003. Ronald, at the time relevant to this appeal, lived with Mary and Carl.¹

Mary, Ronald, and Carl had a long history of involvement with Child Protective Services over a ten-year period. A “substantiated” report of neglect by Mary was made in Hancock County in 1996.² The Parents were then involved in substantiated reports of neglect in Hancock County in May of 1998 and again in November of 1998. In Delaware County in December of 1998, another substantiated report of neglect was made against the Parents. In May of 1998, a report was substantiated against Mary for “child molestation” and “sexual deviant conduct with a minor” in Hendricks County.³ In July of 1999, Mary was involved with another report of neglect in Delaware County. A report of medical neglect was filed against Mary and Ronald in July of 1999. In August of 1999, a report for neglect was filed against Mary and Carl in Hancock County. In April of 2000, two reports of neglect were filed in Delaware County. And in July of 2001, two reports of neglect were substantiated, one in Hancock and the other in Delaware County. Of the reports, Mary was involved in eleven, Ronald in three, and Carl in four. The family had completed a service referral agreement in Hancock County and had participated in informal adjustment in Delaware County prior to the instant case.

In April of 2003, Tracy McQueen, a case supervisor for Marion County Child Protective Services, received a report that a four-year-old child, C.L., had been burned

¹ Upon appeal, Ronald concedes that he lived in the McWhirter home.

² It appears that a report is deemed “substantiated” if, upon investigation, the case worker is satisfied that the report of neglect or abuse has merit.

³ There is no indication that these incidents involved Mary’s own children.

with a cigarette by an individual she referred to as “Mary’s Carl,” i.e. Carl McWhirter. At this time, Carl, Mary, and Ronald were living in a house in Indianapolis. Apparently, C.L. was the child of a neighbor. Ms. McQueen observed four cigarette burns on C.L.’s neck, arm, wrist, and buttocks. Carl denied burning the girl, Mary denied seeing Carl burn the girl, and Ronald claimed he did not know what had happened. N.R., however, stated that he saw Carl burn C.L. because she had not stood still while being made to stand against the wall as a form of punishment. N.R. also claimed that Carl, his stepfather, had burned him as a form of punishment for running through the house.

During her investigation of the burning, Ms. McQueen was informed by A.R. that she had been sexually molested by a family friend. A.R. stated that she had told her parents about the abuse, but they had done nothing about it. Ms. McQueen added the sexual abuse allegation to her investigation. Ms. McQueen noted that A.R.’s account of the sexual abuse was “very specific,” and that A.R. had “advanced” knowledge of sexual behavior. Ms. McQueen therefore considered the claim of sexual abuse to be substantiated. Based upon the Parents’ past history of neglect, the cigarette burns, and the molestation of A.R. by a family friend, the children, except for D.M., who was not yet born, were removed from the Parents’ home in what Ms. McQueen described as “not an easy removal.” Tr. at 719. Amber Boushehry, a home-based counselor who visited the home in May of 2003, testified that the house was dirty and infested with cockroaches and rodents.

Petitions were filed on April 8, 2003, alleging that A.R., N.R., A.M, and T.M. were children in need of services (“CHINS”). At the initial hearing on the CHINS

petitions, the Parents entered into an agreement wherein they admitted to the allegations of the petitions and agreed to participate in certain services. Specifically, Mary and Carl were ordered to participate in home-based counseling, complete parenting classes, and submit to a psychological assessment, and Ronald was ordered to complete parenting classes and submit to a psychological assessment.

Dr. Mary Papandria of Psychological Laboratories performed psychological assessments of each of the Parents. One of Dr. Papandria's functions was to evaluate the Parents' competence to safely raise their children. Dr. Papandria evaluated Mary twice: on the first occasion, Mary was either "unable or unwilling" to complete the evaluations, and on the second occasion, Mary completed the first measure, but refused to complete the second measure, claiming that she had already done the test and that Dr. Papandria was lying to her. Tr. at 18. From the part of the assessment that Mary did complete, Dr. Papandria was able to diagnose Mary with mild mental retardation and major depressive disorder. There was also evidence of a personality disorder with paranoid features. Dr. Papandria concluded that Mary was "somewhat incompetent to make decisions regarding the welfare of her children at that time." Tr. at 21. One of Dr. Papandria's bigger concerns was that Mary claimed that both C.L. and A.R. were, respectively, lying about being burned and being sexually abused.

Ronald similarly refused to complete one of the tests when initially being evaluated by Dr. Papandria, claiming some of the questions were "too personal." Tr. at 27-28. Ronald also failed to complete the second test given, even after being given multiple opportunities to follow directions. However, during her second meeting with

Ronald, he was able to complete both tests. Dr. Papandria diagnosed Ronald with mild mental retardation and a personality disorder with anti-social, paranoid, schizoid, and self-defeating features. Ronald's personality was thus "incredibly maladaptive" and made it very difficult for him to effectively and safely parent children. Tr. at 30. Ronald was in therapy for anger management and took the anti-psychotic medication Risperdal. Dr. Papandria recommended that Ronald undergo two to three years of intensive therapy to deal with his issues.

During Dr. Papandria's initial evaluation of Carl, Carl was unable to complete two measures of the personality test, but did complete both tests on the second evaluation. Carl had an average I.Q. with low-average academic abilities. He had a personality disorder with paranoid, histrionic, dependent, and narcissistic features. Dr. Papandria described Carl as "somewhat incompetent" to rear children and felt that, without improvement, he should be supervised by another adult when he was with the children.

The home-based counselor, Ms. Boushehry, saw the Parents from May of 2003 until June of 2004. After an initial assessment, a goal was set of reunification with the children, and a treatment plan was established to work on mental health issues, safety issues, stress management, and parenting skills. During the first month of the home-based counseling, Ms. Boushehry met with the Parents three times a week, and thereafter met with them twice a week. The initial home-based counseling was moved from the Parents' residence in Indianapolis to the Office of Family and Children's downtown office after Ronald made verbal threats—specifically, that a caseworker should be taken out in the street and shot.

Ms. Boushehry identified stress as a major problem in all three Parents' lives, and she worked with them to develop skills to cope with stress. However, when she would suggest stress-management techniques, the Parents would resist and claim that "nothing worked for them." Tr. at 389. Often, the Parents would become angry and have emotional outbursts during the counseling sessions. The Parents made no progress towards the goal of stress management because they were unwilling to "identify coping skills and work [toward] the goal," and treatment on this goal was discontinued in December of 2003. Tr. at 390.

Ms. Boushehry also worked with the Parents to improve their parenting skills. Ms. Boushehry had observed the Parents having difficulty "redirecting" the children during visitations. As stated above, Ms. Boushehry testified that the Parents' home was filthy when she visited, and Ms. Boushehry was also concerned that neither Mary nor Carl had believed or acted upon A.R.'s allegations of sexual abuse. Ms. Boushehry was also concerned that the Parents let other people stay in their home; indeed, someone had been living with them at the time that A.R. was abused. To help with the parenting skills goal, Ms. Boushehry would review with the Parents each week the things they had learned in the parenting skills classes. The parenting-skills goal was not completed, however, because the goal was "revised" or "merged" to a "safety goal," which included dealing with safety issues in the home as well as child-management issues. This was done not only because of the Parents' current problems, but also due to their prior history of neglect. The Parents were again resistive, however, refusing or unable to accept the

safety issues as problems. Apparently, little progress was made on the safety goal, because when services were discontinued, the goal had not yet been completed.

Ms. Boushehry also monitored the Parents' mental health treatment, which they were receiving at Gallahue Mental Health. Ms. Boushehry described the Parents' attendance as sporadic and encouraged them to attend their mental health counseling. Despite the treatment, Ms. Boushehry did not observe Mary using any coping skills, and Carl refused to take medication, claiming he felt he did not need mental health treatment. Ronald too felt that his mental health treatment was unnecessary. With regard to the goal of mental health treatment, Ms. Boushehry saw no progress on the part of any of the Parents when home-based services were ended after May of 2004. The home-based services were stopped because the Parents had failed to make progress and because the Parents moved to Greenfield, Indiana after being evicted from their residence in Indianapolis. At that time, none of the Parents was employed, but Mary and Ronald were receiving disability assistance. In fact, without the Social Security income received by the children, the Parents were unable to maintain housing and take care of themselves.

Also at the end of May 2004, visitations between the Parents and children were stopped by court order. The visitations were stopped because of what was deemed "inappropriate" behavior by the Parents, including Carl wrestling and roughhousing with the children and Mary telling the children that they would be back home "soon." Tr. at 429. The children also had negative reactions to the visitations and expressed a desire not to go. There was also testimony that the Parents were not terribly consistent with their visitations, although they claimed that there were valid excuses for their absences.

After initially being placed in separate foster homes, the children were placed in therapeutic foster care with Jama and Michael Gillihan and remained with the Gillihans at the time of the hearing on the petition to terminate parental rights. In December of 2003, Mary gave birth to D.M. A CHINS petition was filed soon thereafter, and the infant was placed in therapeutic foster care with his siblings in the Gillihan home.

After being placed with the Gillihans, the children were evaluated, and all four of the older children were diagnosed with some form of attention deficit/hyperactivity disorder (“ADHD”) and had developmental and cognitive delays. A.R. was placed on medication to treat her ADHD. A.R. was also diagnosed with post-traumatic stress disorder (“PTSD”) and had symptoms typical of a victim of sexual abuse, such as a fight-or-flight appearance, exaggerated startle reflex, and not making eye contact. She had social and cognitive delays and, with an I.Q. of fifty-six, was diagnosed with mild mental retardation. She was emotionally deprived and had a flat, expressionless “affect.” Tr. at 279. She complained to her therapist that she had been both physically and sexually abused in the Parents’ home.⁴ Ronald admitted at the hearing that he had whipped his young daughter with a belt. A.R. was unable to do daily activities without significant assistance and was “parentified,” i.e., she thought that she was responsible for “everyone else” and was unable to be “childlike.” Tr. at 280. This made her unable to develop

⁴ A.R. reported to the mental health counselor that she had been hit in the head with a two-by-four and had been sexually abused by two different people. We note that the trial court admitted evidence with regard to the specifics of the physical and sexual abuse reported by A.R. to establish what A.R.’s therapist had considered in developing her opinion, not to prove the truth of the matter asserted. Nevertheless, evidence was received, over the objection of Ronald’s trial counsel, that A.R. had reported both physical and sexual abuse in her parents’ home. No issue is presented with regard to the admission of evidence by the trial court.

emotionally, psychologically, and verbally. Her math and reading skills were at a first-grade level even though she was eight years old at the time.

After being in therapeutic foster care with the Gillihans, A.R. showed remarkable improvement. Her I.Q. was at 105, her reading and math skills were more age-appropriate, and she made the honor roll at school. She was also active in 4-H and extracurricular activities in school. Her mental health counselor stated that it would be “devastating” if A.R. were removed from therapeutic foster care and returned to her parents. Tr. at 306-07.

After first being placed in foster care, N.R. too had a flat, expressionless affect and was withdrawn at times. He did not understand expectations and consequences and was very impulsive. He was aggressive in his play, beyond “normal roughhousing” and required constant supervision. He had poor self-esteem and a poor self-image and was enuretic and encopretic⁵ throughout the day and at night. N.R. was diagnosed with ADHD and PTSD and was taking medication to treat ADHD. He had fearful responses and would “freeze” if he thought he was in trouble. He related to his counselor vivid recollections of being beaten with a board which was used by all three Parents. After being in therapeutic foster care, N.R. also began to show improvement. Specifically, his PTSD symptoms began to disappear, he was “much more on target . . . academically” and had shown an improved ability to focus and concentrate. Tr. at 771-72. He was in second grade and receiving good grades. He was also not as aggressive as he used to be.

⁵ That is, he was not properly potty trained and both his urination and bowel movements were uncontrolled.

Still, however, his I.Q. was sixty-three, which qualified him as mildly mentally disabled, he required special help in school, and he was easily distracted. N.R. expressed his desire not to go back to live with his parents and wants to stay with the Gillihans.

A.M. was diagnosed with a “combined” type of attention deficit disorder, including both hyperactivity and inattentiveness. He was also diagnosed with mild to moderate mental retardation. His speech was extremely delayed, he was underweight, and he too had a flat, expressionless affect. He reacted to being removed from his parents “inappropriately” in that he expressed joy rather than sadness. Since being in therapeutic foster care, A.M. has shown progress, although he still requires reminders to use appropriate behavior. His speech has improved “dramatically.” Tr. at 173.

T.M. was also diagnosed with the combined form of attention deficit disorder with which A.M. was diagnosed, along with mild mental retardation. When he was first removed from his parents, he had a Global Assessment of Functioning rating of fifty. Even though he was three years old, he was virtually unable to speak, being able to speak only five or six words and expressing himself through grunting and use of guttural sounds. Both he and A.M. could not be left alone “for even a moment” because of their dangerous behavior. Tr. at 157. At the time of the hearing, after being in therapeutic foster care with the Gillihans, T.M.’s Global Assessment of Function rating had improved to sixty-five. T.M. would maintain appropriate behavior unless someone else instigated the inappropriate behavior. He responded well to redirection and had a decrease in throwing tantrums. His speech and verbal skills were on target, even though he was approximately six months behind his peers.

Due to his age (D.M. was a newborn infant when placed in foster care) therapists were “unsure” of the significance of D.M.’s cognitive and developmental delays. Riley Hospital indicated that fetal alcohol effect was something which needed to be “ruled out.” Tr. at 163. His Global Assessment of Functioning rating was thirty-five upon removal from his parents but had improved to seventy by the time of the hearing.

On November 12, 2003, the Marion County Office of Family and Children (“OFC”) filed a petition for the involuntary termination of the parental rights of the Parents vis-à-vis the four older children. A similar petition was filed on September 10, 2004, seeking the termination of Carl and Mary’s parental rights to D.M. The two actions were consolidated on September 12, 2004. After several continuances and delays, the trial court heard evidence on the termination issue on May 12, May 31, and June 1, 2005, and on February 1, 2006. On March 24, 2006, the trial court entered findings of fact and conclusions of law terminating the parental rights of all three Parents to their children. Carl filed a notice of appeal on April 3, 2006, Ronald filed a notice of appeal on April 5, 2006, and Mary filed a notice of appeal on April 21, 2006.

As noted by this court in Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 620 (Ind. Ct. App. 2006), trans. denied:

“This court has long had a highly deferential standard of review in cases concerning termination of parental rights. Parental rights are of a constitutional dimension, but the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities. We will not set aside the trial court’s judgment terminating parental rights unless it is clearly erroneous. We neither reweigh evidence nor judge witness credibility, and we consider only the evidence most favorable to the judgment along with reasonable inferences to be drawn therefrom.” (citations omitted).

Pursuant to Indiana Code § 31-35-2-4(b)(2) (Burns Code Ed. Repl. 2003), to involuntarily terminate a parent-child relationship, the OFC petition must allege that:

- “(A) . . .
- (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
 - (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court’s finding, the date of the finding, and the manner in which the finding was made; or
 - (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
- (B) there is a reasonable probability that:
- (i) the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.”

These elements must be proved by clear and convincing evidence. Ind. Code § 31-34-12-2 (Burns Code Ed. Repl. 2003).

When evaluating the circumstances surrounding the termination of a parent-child relationship, the trial court should subordinate the parent’s interests to those of the children. Rowlett, 841 N.E.2d at 620. Before terminating the parent-child relationship, the trial court need not wait until the children are irreversibly harmed such that their physical, mental, and social development is permanently impaired. Id. In determining whether the conditions that led to the children’s removal are likely to be remedied, the trial court must assess the ability of the parents to care for the children as of the date of

the termination proceeding and take into account any evidence of changed conditions. Id. However, the trial court should also take into account the parent's habitual patterns of conduct to determine the probability of future detrimental behavior. Id. The trial court should also look to the services offered by the OFC to the parent and the parent's response to those services. Id.

All of the Parents present slightly differently worded arguments, but all are essentially attacks upon the sufficiency of the evidence supporting the trial court's decision. Indeed, the Parents arguments are largely requests that we look to the evidence which was favorable to them and come to a conclusion contrary to that of the trial court. This is not our function as an appellate court. See Rowlett, 841 N.E.2d at 620.

With regard to the statutory elements which are required to terminate parental rights, we note that none of the Parents claim that the OFC failed to meet its burden under I.C. § 31-35-2-4(b)(2)(A). Section 4(b)(2)(B) requires that the OFC prove that there is a reasonable probability that either (i) the conditions that resulted in the children's removal or the reasons for placement outside the home of the parents will not be remedied or (ii) that the continuation of the parent-child relationship poses a threat to the well-being of the children. Here, there was sufficient evidence to support a conclusion that the continuation of the parent-child relationship posed a threat to the well-being of the children.

As detailed above, each of the Parents had a history of neglecting their children to the point of requiring intervention by child protective services. There was evidence that Carl burned a neighbor child and N.R. with a cigarette as a form of punishment. A.R.

had reported sexual abuse to her parents, yet the parents did nothing to report it to the authorities and still had other people living in their home at the time of removal. A.R. and N.R. were diagnosed with post-traumatic stress disorder, and all of the children showed signs of developmental delays. The Parents posit that these delays are simply the result of genetics. They point to the fact that D.M., who was removed from his parents shortly after birth, also showed signs of developmental delays. This argument, however, is belied by the remarkable improvement the children have shown while in foster care. Indeed, A.R. went from being diagnosed as mildly mentally retarded while in her parents' care to being on the honor roll. The younger boys were dangerously aggressive, yet in foster care also showed marked improvements. The Parents showed little progress in parenting skills, safety, or mental health. There was evidence that a return to the Parents would be devastating to the children and their progress. From this evidence, and the evidence detailed above, we cannot say that the trial court's conclusion that there was a reasonable probability that the continuation of the parent-child relationship posed a threat to the well-being of the children was clearly erroneous.

There was also evidence which would support the trial court's conclusion that the conditions that resulted in the children's removal or the reasons for placement outside the home of the Parents would not be remedied. Despite some evidence of improvement on the part of the Parents, there was also evidence that they had made little progress in the services offered to them by the OFC. Given the Parents' less-than-stellar history of child rearing, and the lack of progress demonstrated, we cannot say that the trial court's

conclusion that there was a reasonable probability that the conditions which led to the children's removal would not be remedied was clearly erroneous.

This evidence also supports the trial court's conclusion that termination of the parent-child relationship was in the best interests of the children. The children, who were obviously neglected, and some even physically abused, were suffering from mental disorders and developmental delays while in the Parents' care. Indeed, Laura Svobodny, a counselor who supervised the children's placement in therapeutic foster care, stated that the children, especially A.R., needed a sense of stability in their lives. The Parents would have the children remain in limbo until they might someday progress far enough that their children would no longer be in danger while in their custody. We cannot fault the trial court for concluding that termination of the Parents' parental rights was in the best interests of the children.

Lastly, we cannot say that the trial court erred in its conclusion that there is a satisfactory plan for the care and treatment of the children. The plan for the care of the children was for them to be adopted by their current foster parents. The evidence was overwhelming that the children are thriving in the care of the Gillihans. All have shown marked, and in the case of A.R., astounding improvement while in their care. Adoption by the Gillihans is clearly a satisfactory plan for the care and treatment of the children.

The Parents all argue that their rights were terminated simply because they were poor, whereas the foster parents, with whom the children did much better, were wealthier. It is true that parental rights may not be terminated simply because the parents are economically disadvantaged. In Tipton v. Marion County Dep't of Pub. Welfare, 629

N.E.2d 1262, 1268 (Ind. Ct. App. 1994), the court reversed the trial court's decision to terminate the father's parental rights, stating:

“Unless the father's poverty causes him to neglect his child or exposes the child to danger such that removal from his care would be warranted, the fact that the father is of low or inconsistent income of itself does not show unfitness. . . . The fact of inconsistency in income shown by the record does not support a reasonable inference that [the father]'s economic circumstances pose a threat to his child, or would ultimately lead to the child's removal from him.” Id. (citations omitted).

We agree that poverty alone does not show unfitness. That does not mean, however, that poverty which causes a parent to neglect a child or expose the child to danger cannot be considered by a trial court in determining whether to terminate parental rights. See id. Here, the evidence presented demonstrates that the decision to terminate parental rights was not based upon the Parents' poverty, but upon their neglect of their children coupled with their failure to progress sufficiently to allow the children to return. In short, we cannot say that the trial court's decision was clearly erroneous.

The judgment of the trial court is affirmed as to each of the Parents.

SHARPNACK, J., and CRONE, J., concur.